Terrace Gardens Plaza, Inc. *and* Local 32B-32J, Service Employees International Union, Petitioner. Case 29–RC–7996

November 26, 1993

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The Employer's request for review of the Regional Director's Supplemental Decision on Objections and Certification of Representative is granted with respect to the Employer's Objection 2 as it raises a substantial issue whether the Employer's failure to timely receive and post the notices of election in a mail ballot election, required by Section 103.20 of the Board's Rules and Regulations, warrants setting aside the election.[1] The Regional Director overruled this objection on the ground that the notices of election had been mailed directly to eligible voters, thereby affording all voters the opportunity to read the notice and, therefore, the Employer's failure to timely receive and post such notices for the required 3 days is insufficient to require a new election. Having carefully considered the matter, we find, contrary to the Regional Director, that the Employer's failure to timely receive and post the notices is a violation of the mandatory requirements of the notice-posting rule which warrants setting aside the election.

The undisputed facts show that the Employer is engaged in the ownership and management of a cooperative apartment complex. On January 12, 1993, the Regional Director issued a Decision and Direction of Election in a unit of approximately 15 building service employees. Thereafter, Regional personnel made a series of phone calls to the Employer's counsel between January 19 and 27, 1993, seeking information necessary to conduct a manual election. Counsel, however, was unavailable and the calls were never returned. By letter dated January 28, 1993, the Employer and the Petitioner were advised that, due to the Employer's failure to cooperate in furnishing information necessary to arrange a manual election, the Regional Director had determined to conduct a mail ballot election with the ballots to be dispatched to the eligible voters on February 4, 1993, and the deadline for receipt of ballots set for February 24, 1993. The parties were further advised that copies of the notice of election would be forwarded to all parties and their representatives shortly. This correspondence was received by the Employer's managing agent on February 1, 1993, and by the Employer's counsel on February 2, 1993. The Employer's counsel responded by letter dated February 2, 1993, in which he claimed the Region had not returned his calls, disputed his failure to provide all requested information, and urged that the election be postponed until after ruling on the Employer's request for review,[2] and that it be conducted at the workplace.

The notice of election was not received by the Employer until February 4, 1993, the same day as the ballots were mailed. By letter dated February 4, 1993, Employer's counsel protested conducting the election without the required 3-day posting, and urged that the election be postponed. The Regional Director responded both orally and by letter dated February 5, 1993, denying the request for a postponement, outlining the circumstances which had led the Regional Director to determine to conduct a mail ballot election, and noting that although the Employer may not have received the notice of election until the day the ballots were mailed, eligible employees were mailed copies of the notice with their ballots so that they would ''be properly apprised of their rights and the details of the election.''

The mail ballots were opened and counted on February 26, 1993. The corrected tally of ballots showed nine votes for the Petitioner, zero against, two challenged ballots, and six void ballots (five due to late receipt). The Employer timely filed six objections. In its Objection 2, the Employer argued that the election should not have been held without the requisite 3-day period for the posting of the notice of election. The Regional Director overruled this objection for the reasons set forth in his letter of February 5, 1993, as discussed above.

Section 103.20 was promulgated and implemented in an effort to make clear to all parties their responsibilities and obligations vis-a-vis notice-posting and to eliminate time-consuming case-by-case analysis. Thus, in Section 103.20(a), the Rule specifically provides that the Board's official notice of election must be

[1] Sec. 103.20 of the Board's Rules and Regulations provides:

(a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

(b) The term ''working day'' shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.

(c) A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

(d) Failure to post the election notice as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under provisions of section 102.69(a).

[2] On February 3, 1993, the Employer filed a request for review of the Regional Director's Decision and Direction of Election involving the issue of whether the Regional Director erred in not finding a contract bar. The request for review was denied on February 25, 1993.

posted for 3 working days prior to the election. This section applies to mail ballot elections as well as to manual elections as the section contains a specific reference to mail ballot elections, i.e., ''[i]n elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail.''

Moreover, the Rule's provisions are mandatory in nature, stating that ''failure to post the election notice . . . shall be grounds for setting aside the election.'' They do not provide for any alternative means of compliance, contrary to the opinion of our dissenting colleague. Rather, as noted above, notice posting is specifically required in mail ballot elections under Section 103.20. Thus, while notices may be directly mailed to eligible voters in a mail ballot election, as they were here, that practice does not eliminate a Regional Office's responsibility to timely furnish employers with election notices or the employer's obligation to timely post such notices.

Further, the Rule's provisions do not allow for any analysis as to the actual impact of noncompliance on a particular election. Under the Board's decision in *Smith's Food & Drug*, 295 NLRB 983 fn. 1 (1989), the Board will not inquire into the number of employees who actually voted, as the lack of impact on the election resulting from nonposting does not excuse compliance with the explicit provisions of the rule. Therefore, our dissenting colleague's argument that the election results should be certified because all eligible voters received and cast ballots is inapposite.

We also note that the notice-posting requirement in a mail ballot election serves an important purpose in that if for any reason an employee does not receive the mailing, the posted notice will inform the employee of the election and instruct that person to contact the Region to procure a ballot.[3]

Finally, we find that a contrary result, as reached in our dissenting colleague's case-by-case approach, would require the Board to engage in precisely the type of inquiry Section 103.20 was designed to obviate, i.e., unnecessary and time-consuming litigation over compliance with the notice-posting requirement. Consequently, as the Rule was not complied with here, a new election must be conducted.[4]

Accordingly, the Employer's Objection 2 is sustained, and the case is remanded to the Regional Director for the purpose of scheduling a second election, including the posting of notices as required by Section 103.20 of the Board's Rules and Regulations.[5]

MEMBER DEVANEY, dissenting.

Contrary to my colleagues, I would not set aside the election under the circumstances presented here. I agree with the Regional Director that the Employer's Objection 2 lacks merit. The express purpose of the notice-posting requirement set forth in Section 103.20 of the Board's Rules and Regulation was to protect employees by ensuring that they would be informed of their rights, and to decrease litigation on matters pertaining to an employer's obligation to post the notice of election. That purpose is best effectuated here by allowing the results of the election to stand. Moreover, at the time the rule was promulgated, the Board acknowledged in the accompanying explanatory statement that some issues would require case-by-case determinations. Thus, I do not agree with my colleagues' view that in every case the failure to post the notice for a full 3 days before the election is per se grounds for setting aside the election, and I find in the unusual circumstances of this case that employees' rights in the election were fully safeguarded.

The majority concedes that, following the issuance of the Decision and Direction of Election, the staff of the Regional Office attempted repeatedly but in vain to obtain from the Employer's counsel the information necessary to conduct a manual election. Counsel did not return the Region's telephone calls. Based on this lack of cooperation, the Regional Director determined that the election would be conducted by mail and advised the parties by letter dated January 28, 1993, that the ballots would be mailed on February 4.

Section 103.20(c) of the Board's Rules and Regulations requires employers to inform the Regional Office if they do not receive the election notice in time to comply with the posting requirement. Employers are routinely informed of the notice-posting requirements, including their obligations in that regard, at the time petitions are served on them. While the timing of events here precluded the Employer from contacting the Regional Office 5 days in advance as the rule requires, I nevertheless find that the Employer had an obligation to raise this issue promptly when it received the Regional Director's letter scheduling the election

[3] See NLRB Casehandling Manual (Representation Proceedings), 11336.3.

[4] Contrary to the dissent, we also find that the Employer is not estopped by Sec. 102.30(c) from objecting to the nonposting. Although that section provides that an employer is conclusively deemed to have received the notice of election if it does not notify the Regional Office at least 5 working days prior to the election that it has not received copies of the notice, that section is inapplicable here as the Employer was not informed by the Region of the date set for the election until 2 or 3 days before the actual election date. There is nothing in the Rule to support the dissent's finding that by not raising the issue on February 2 or 3, the Employer somehow ''failed to meet its own obligation under Section 103.20,'' thereby precluding it from objecting to the election on the basis of the nonposting. Moreover, notification by the Employer on either of those days would have been untimely under the Rule. Here, the Employer was never given an opportunity to timely advise the Regional Office that it did not receive the notices. Cf. *Sugar Food*, 298 NLRB 628 (1990).

[5] In view of our decision here it is unnecessary to reach the other issues raised by the request for review.

but did not have the election notices in time for a 3-day posting. The Employer did not raise this issue either in its February 2 letter to the Regional Director or in its February 3 request for review to the Board. Indeed, the Employer expressed no objection regarding this matter until February 4, the date the ballots were mailed to eligible voters. Having failed to meet its own obligation under Section 103.20, the Employer should not be permitted to rely on the posting requirement in its effort to overturn the election.

Furthermore, on the facts of this case, it is clear that the policies underlying the posting requirement were satisfied. The employees were fully informed of their rights and the Board's procedures with respect to the election, because the Regional Office included a copy of the election notice with each mail ballot. All of the eligible voters received and cast ballots in the election. Of the six ballots deemed void, five were invalidated due to late receipt and the Employer's refusal to waive the deadline. The Employer, as the objecting party, does not assert and has presented no evidence that any employee failed to receive notice of the election or was unable to vote within the 20-day voting period as a result of the late posting of the election notice.[1] Based on the circumstances of this case, including the Employer's failure to cooperate in arranging the election, its failure to object concerning the notice-posting issue in a timely manner, and the absence of any indication that the election was affected in any way by the late posting, I would deny the Employer's request for review.[2]

[1] I note that the Employer has not challenged the Regional Director's specific finding that all eligible employees did in fact receive notices and ballots.

[2] I find *Smith's Food & Drug*, 295 NLRB 983 (1989), distinguishable from this case. In *Smith's* the Board set aside a manual election, based on an objection by the petitioner, where the employer failed to post the election notice for the required 3-day period and did not notify the Regional Office of its late receipt of the notice.